

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

DWIGHT and SHIRLEY LEWIS,

Appellants,

v.

SAN JUAN COUNTY and State of  
Washington DEPARTMENT OF ECOLOGY,

Respondents.

PCHB No. 91-183

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

Dwight and Shirley Lewis d/b/a Windsock Farm and Excavation appealed San Juan County and the Washington Department of Ecology's joint issuance of Order No. DE 91-N171 ("Order"). The joint Order alleged violations of a Stipulation and Agreed Order of Dismissal, and pursuant to the Stipulation assessed a penalty of \$3,500. The Order required that all provisions of Phases I and II of the Stipulation be implemented prior to returning cattle to the field in 1991-1992, including the installation of a roof over the feed trough.

The Pollution Control Hearings Board held a formal hearing, with closing oral argument on December 6, 1991. The hearing on the merits was held on October 24, 1991. Present for the Board were Member Judith A. Bendor, Presiding; Chair Harold S. Zimmerman; and Member Annette McGee. Appellants Lewis were represented by Attorney M. Fred Weedon. Respondent San Juan County was represented by Deputy Prosecuting Attorney Paul McIlrath. Respondent Department of Ecology (DOE) was represented by Assistant Attorney General Kerry O'Hara.

1 Court reporters with Gene S. Barker and Associates (Olympia) took the  
2 proceedings. Pre-hearing briefs were filed. By order of the Board,  
3 test results were admitted and filed after the hearing, before oral  
4 argument.

5 From the testimony heard, exhibits examined, and arguments read  
6 and heard, the Board issued an oral opinion on December 20, 1991.  
7 Thereafter, the Board held another conference with the parties on  
8 January 3, 1992, and suspended part of the oral ruling, providing the  
9 parties the opportunity to file additional briefs. These were filed  
10 on January 13, 1992. Having considered all the foregoing, the Board  
11 on January 14 announced an oral ruling. This written decision  
12 confirms that ruling, and if inconsistent, supercedes the oral ruling:

13 FINDINGS OF FACT

14 I

15 On Lopez Island, San Juan County, Dwight and Shirley Lewis d/b/a  
16 Windsock Farms and Excavation, conduct a winter calving operation  
17 involving up to 85 cows. They lease a field from Mr. Adcock who lives  
18 nearby. When the other fields Lewis uses become too wet for the cows,  
19 usually in December, the cows are brought to this field. They remain  
20 here until they calve. The cows are fed on-site.

21 The leased field slopes down to a pond which is connected to  
22 Hummel Lake by a culvert. Hummel Lake is the largest fresh water body  
23 on Lopez Island.

1 In 1990 a stream existed on-site, flowing across the field and  
2 entering the pond. The cows had direct access to the stream and the  
3 pond. A diversion ditch about 500 to 1,000 feet long skirts the field  
4 before it enters a broad, flat wetland about 75 to 100 feet before the  
5 pond.

6 The wetland is slightly upgradient from the pond. Water speed is  
7 slowed as it traverses the wetland. The wetland is a few feet wide  
8 where the ditch enters, and broadens out to 20 to 30 feet wide. There  
9 is no defined stream channel. The wetland is about one foot deep,  
10 with thick vegetative grasses.

## 11 II

12 In 1990 the County and DOE issued enforcement orders to the  
13 Lewis, alleging water quality and shoreline violations from the  
14 calving operations during the winter of 1989-1990. These orders were  
15 appealed to the Pollution Control and Shorelines Hearings Boards and  
16 were assigned these numbers: PCHB Nos. 90-80 and -122,  
17 SHB Nos. 90-24, and -33 and -39.

18 After motions practice, the parties signed a Stipulation and Order  
19 of Dismissal ("Settlement"). The Board entered the Stipulation and  
20 Order of Dismissal on February 5, 1991. A complete copy of the  
21 Settlement and Order is attached as Appendix A to this decision.  
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**The Settlement stated in part:**

During the past winter of 1989-90, water quality tests performed by Department of Ecology personnel revealed high levels of fecal coliform in the "pond" water. To reduce the threat posed to the water quality of Hummel Lake and its "pond" and wetlands, the parties agree to ... phased conditions [.]

### III

By way of background, an average cow excretes from 50 to 70 pounds of manure (wet weight) per day per animal, 15 to 20 gallons. Seventy-five cows would deposit approximately 3,750 to 5,000 pounds of manure per day.

The field drains into the pond and wetland. Geese and other water fowl inhabit the pond, contributing their waste to the waters. Deer are also seen around the pond. Above the pond, at least 100 feet up-gradient, is the property owner's single family sewage drain field. It has on occasion failed, with grayish water seen surfacing and then disappearing underground. The drain field discharge flows across sands and clay soils, likely in the direction of the pond.

Mammal and bird wastes contain phosphorous and nitrogen, which are nutrients. Nutrients can contribute to the growth of plant material in a lake, and can contribute to or increase the rate of lake eutrophication.

## IV

The Settlement required, in part, that DOE conduct background

1 fecal coliform tests in the pond before the cattle were back on the  
2 field. Fecal coliform is an indicator of pollution from warm blooded  
3 animals. Cow manure when first excreted may have a fecal coliform  
4 level in the tens of millions of colonies/100ml (milliliters). The  
5 bacteria tend to die off after leaving the host. The bacteria's  
6 survival time after leaving the host depends upon several factors,  
7 including time, temperature, the medium, and other factors. When the  
8 temperature is lower, the bacteria do not reproduce as rapidly.  
9 Conversely, at a higher temperature, fecal coliform might reproduce  
10 more rapidly. Properly handled water quality samples are kept at a  
11 specific temperature, about 40 degrees farenheit, to prevent the  
12 bacteria from increasing.

13 V

14 On December 10, 1990, Bob Wright with DOE took water quality  
15 samples at a location in the pond later identified as Point E on Exh.  
16 R-13. In taking and handling the sample, he used known scientific  
17 protocols. In particular, he took the samples with a sampling rod,  
18 not allowing the rod to touch the pond bottle. He placed the samples  
19 in standard sample bottles, and labeled them. He placed the samples  
20 in an ice chest to keep them cool. He prepared a chain of custody for  
21 the samples. On December 11, 1991, at DOE's request, Paul Ferguson  
22 with the County Planning Department, took samples. He had Wright's  
23 instructions on sampling.

The samples were tested at AMTEST, Inc., in Redmond. The AMTEST laboratory was and is certified by the State under Chapt. 173-50 WAC, and is therefore an accredited laboratory.

The test results showed fecal coliform levels of 43.8, 36.6 and 18.8 colonies/100 ml. The birds, deer and drainage field wastes would likely have been reflected in these background fecal coliform tests. All parties agreed in the Settlement to a background fecal coliform standard of 50 colonies/100 ml. (Condition 1, p. 2).

During the 1990-1991 season when cows were in the field, the Settlement required DOE or its designee to conduct fecal coliform tests from the pond in the same general location as the background samples. (Condition 1.)

## VI

The Settlement required Mr. Lewis, among other matters, prior to bringing the cows onto the field for the 1990-1991 season, to place electrical wiring 10 feet back from stream banks and 100 feet from the pond to permanently block the cattle's access to the water areas and immediate surrounding land. (Condition 2, pp. 2-3). If the wire were insufficient to keep the cattle from the water areas, that would be a violation of the Settlement. Permanent fencing was to be installed within one week of a violation, or the cattle were to be removed from the field.

The field was to be inspected by DOE or its designee. If it were determined there had been compliance with the conditions, the cattle were to be allowed onto the field during this season.

In the ensuing summer/fall of 1991, Mr. Lewis was to construct permanent fencing in place of electrical wiring, install a lip onto the concrete pad beneath the feed trough, develop a solid waste removal and disposal plan, and submit it to the County and DOE for review, and so forth.

If the fecal coliform tests taken by DOE during the 1990-1991 calving season had results greater than 100 colonies/100 ml, Mr. Lewis was required to roof the feed trough and concrete slab area before placing any cattle back on the field in 1991-1992. (Condition 5, p. 6). The roof is required to meet or exceed Soil Conservation Service standards and specifications.

VII

The Settlement waived past penalties, provided there was continuing compliance with the Settlement. (General Provisions 1, p. 8). Failure to comply would lead to the reinstatement of penalties at \$250 a day for each violation. Water quality violations (arising out of violations of these conditions) were subject to an additional penalty up to \$1,000 per day per violation. (Condition 2, p. 8). The Settlement stated specifically it did not authorize diversion of the stream. (Condition 4, p. 8).

VIII

On January 17, and 30, 1991, DOE employee Bob Wright inspected the field. The cattle were back on the field. The stream waters, after entering the property, flowed into an area later designated on Exh. R-13 from below point B to A ("B/A"). Lewis had diverted most of the stream, so the stream then primarily flowed into a diversion ditch which flowed around the perimeter of the field. The diverted waters flowed into the wetland and the pond after flowing about 500 to 1,000 feet in the ditch. A later inspection in April 1991 revealed that some of the stream still flowed across the field.

The pond had been permanently fenced, though a portion of the fencing was only 75 feet from the pond. The stream area below point B to point A, the stream channel across the field, and the ditch, had not been fenced by electrical wiring or permanent fencing.

IX

The DOE expressed its concerns about this situation (letter dated February 14, 1991). They noted that cattle had been placed in the field prior to DOE's inspection, and expressed particular concern regarding the wiring/fencing. DOE cautioned about enforcement action for continuing violations. DOE requested the wiring be completed by February 21, 1991 or Lewis would face enforcement action. Appellant responded (letter dated February 27, 1991), agreeing to limit the number of cattle to 30. Further correspondence ensued.



X

On January 28, 1991, at the request of the County Sanitarian Keven Barry, Mr. Ferguson took a water sample from the pond near the culvert to the Lake, which is across the pond from the December 1991 (point E in Exh. R-13) background sample location. On February 19, 1991, at Barry's request, Ferguson took a water sample from Hummel Lake near the culvert. Ferguson lives on the Island. Barry regularly has the Lake sampled for the Health Department, as the lake is the largest freshwater body on Lopez Island.

Ferguson placed the samples in his backpack, and delivered them three hours later to the Health Department. Barry kept them for about one hour, placed them in a mailing container and sent them by United Parcel to Skagit County Health Department's laboratory. No evidence has been presented on whether this is an accredited laboratory under State of Washington regulations.

The San Juan Health Department received the test results and they showed fecal coliform levels of 3.6/100 ml for the pond sample from January, and 43/100 ml for the Lake sample from February. Some time in about February 1991, Ferguson saw Lewis on the ferry and told him the results were fine.

XI

On April 10, 1991 Bob Wright for DOE and County personnel inspected the field. Numerous pictures were taken. The field had

1 been divided into two areas, with about 25 cows in the lower field,  
2 and a maximum of 50 animals in the upper field.

3 At the time of the inspection, there was water flowing from area  
4 B/A down the diversion ditch and also down the field through the  
5 stream channel. It was estimated that during high flows, about 10% to  
6 25% of the stream was flowing down the field stream channel.

7 By this date, Lewis had not wired or fenced off: the stream  
8 below point B to point A (Exh. R-13), the field stream channel, or the  
9 diversion ditch. The cows had been very active in the stream in area  
10 B/A, leaving numerous cow patties and manure in the stream. The  
11 cattle's tromping was so extensive, witnesses and counsel referred to  
12 it as the "wallowing area". The cattle had also had unencumbered  
13 access to the field stream channel. There was no evidence presented  
14 of cow patties in the diversion ditch. Much of the ditch's length was  
15 inaccessible to the cattle.

## 16 XII

17 On April 10, 1991, Wright took grab water samples from five  
18 different locations. In taking and handling the samples, he again  
19 followed acknowledged scientific protocols. He marked the samples and  
20 personally delivered them that same day to the AMTEST, Inc. laboratory  
21 in Redmond.

22 DOE sent a further letter (dated April 15, 1991) warning about  
23 the lack of wiring/fencing, the evidence of cattle in the stream, and  
24

1 warning about enforcement action.

2 The sample tests, reported on April 19, 1991, showed the  
3 following fecal coliform levels:

- 4 1. Upstream before stream enters Lewis field, 25 colonies/100ml;
- 5 2. Stream (area below point B and fence to A on Exh. R-13,  
6 160,000 colonies/100 ml;
- 7 3. Wetland (point D on Exh. R-13), 6 colonies/100 ml;
- 8 4. Field stream channel (point C on Exh. R-13), 1,188  
9 colonies/100 ml; and
- 10 5. Pond (point E on Exh. R-13), 20,000 colonies/100 ml.

11 We find it likely that Lewis' cattle caused the fecal coliform  
12 levels at point C and point E to be greater than 50 colonies/100 ml,  
13 and the exceedances were caused by Lewis not having wired or fenced so  
14 as to prevent entry by the cattle.

#### 15 XIII

16 From all the evidence, we find the test results in the background  
17 samples, Finding of Fact IV, above, and the test figures from the  
18 April 10, 1991 inspection, Finding of Fact XII above, to more likely  
19 than not be reliable.

#### 20 XIV

21 On July 8, 1991 DOE and the County jointly issued Order No. DE  
22 91-N171 to Mr. Dwight Lewis, assessing \$3,500 in penalties and  
23 requiring a roof be installed before returning the cattle to the  
24 field.

1 The Order alleges there were violations of the Settlement by:  
2 1. failing to fence or wire the stream and the diversion ditch;  
3 2. by causing high fecal coliform counts in the waters in  
4 violation of water quality, RCW 90.48.080.

5 The Order assessed \$250 per day for 10 days for the  
6 fencing/wiring violations (\$2,500), and \$1,000 for the alleged water  
7 quality violation. The Order also stated that no cattle were allowed  
8 on the field until the penalty is paid and all aspects of Phases I and  
9 II were fulfilled, including the roof requirement.

10 Dwight and Shirley Lewis appealed the Order, which became appeal  
11 number PCHB 91-183.

12 XV

13 Any Conclusion of Law deemed to be a Finding of Fact is hereby  
14 adopted as such.

15 From these Findings of Fact, we make these Conclusions of Law:

16 CONCLUSIONS OF LAW

17 I

18 This case is unusual. It involves an enforcement order which  
19 itself is based upon a Settlement and Order of Dismissal to which all  
20 parties agreed.

21 No party has asserted that the Settlement or Order of Dismissal  
22 are void due to fraud or other cognizable ground.

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II

The Board's lawful authority is to determine if the Enforcement Order was correct in its recitation of events and violations of the Settlement. To the extent the Board finds and concludes a predicate event or violation has occurred, absent agreement otherwise by the parties, the Board concludes it is without authority to modify the remedy chosen by the parties in the Settlement.

In settlement, typically, each party concedes something in order to resolve a matter and avoid litigation. A settlement is an agreement among parties, essentially a contract. Having been entered by the Board, it is like a final judgment in its binding effect. The Board has the responsibility to uphold the parties' agreement and the resultant Board Order.

Moreover, it is noted that if the Board were to modify remedies absent parties' agreement, this could have a negative effect on possible future settlements. Other parties may be more reluctant to settle, concerned their agreement would not be binding. Neither parties nor society would benefit from such a trend.

III

The Settlement clearly states that its basic purpose is to reduce the threat posed to the water quality of Hummel Lake and its "pond" and wetlands.

We have previously found Dwight Lewis brought the cattle back to

1 the field without first placing electrical wire or fencing to prevent  
2 the cattle's entry into the stream. The cattle did enter the stream  
3 in area B/A and the channel that flowed across the field. Both these  
4 areas drained to the pond and Hummel Lake. (Respondent DOE concedes,  
5 however, that a dry, unused stream channel need not now be wired or  
6 fenced.)

7 The basic purpose of the Settlement is to reduce the threat of  
8 pollution to the pond, Hummel Lake and its wetlands. We conclude the  
9 Settlement required in Phase I that Lewis wire or fence the stream,  
10 the stream in the field and the diversion ditch to prevent the  
11 cattle's entry. Lewis actively diverted the stream so that most of  
12 the flows entered the ditch. The waters drained into the wetland, the  
13 pond and Hummel Lake via the ditch and the stream in the field. Both  
14 waters constituted waters of the state and are subject to RCW  
15 90.48.080. (At the December 6, 1991 oral argument, appellant's  
16 counsel asserted that Mr. Lewis had recently placed electrical wire  
17 along the ditch.)

18 Dwight Lewis did violate the wiring/fencing provision of the  
19 Settlement for at least 10 days. The Order should be affirmed in that  
20 regard.

21 The Settlement provides for a penalty of \$250 per day per  
22 violation. The Order assessed \$2,500 for ten days of violation. We  
23 have concluded the predicate violations occurred. We are without  
24 authority to modify the remedy.

1 We note, however, the failure to wire/fence may have existed for  
2 more that 10 days. If that were the case, the government entities  
3 chose to allege and assess less than the maximum recited in the  
4 Settlement.

5 IV

6 Fecal coliform counts of 160,000 colonies/100 ml and  
7 1,188 colonies/100 ml were found at stream area B/A and point C on  
8 April 10, 1991. These are waters of the state. Under state  
9 regulations, Chapt. 173-201 WAC, feeder streams to lakes which are  
10 Class AA waters, are not to exceed 50 colonies/100 ml. The April 10,  
11 1991 levels constituted water quality violations. RCW 90.48.180.

12 We have previously found the Lewis cattle likely caused these  
13 levels because Lewis failed to wire/fence the waters so as to prevent  
14 their entry. We therefore now conclude Lewis caused the water quality  
15 violations by his violation of the Settlement condition to wire/fence  
16 to prevent entry.

17 The Settlement provides for a \$1,000 penalty for each water  
18 quality violation which arises out of a violation of a Settlement.  
19 The Order assessed a \$1,000 penalty. We are without authority to vary  
20 this remedy.

21 We note, however, that absent the Settlement Agreement, Chapt.  
22 90.48 RCW provides for up to \$10,000 penalty per day per water quality  
23 violation.

1  
2 The Settlement requires DOE, during the 1990-1991 calving season,  
3 to do water quality tests in the pond in the same general location as  
4 the background samples. If the fecal coliform tests produce  
5 "readings" greater than 100 colonies/100 ml, the Settlement requires  
6 Lewis to construct a roof to completely cover the feed trough and  
7 concrete slab area prior to bringing the cows back on the field for  
8 the 1991-1992 calving season. The roof has to meet or exceed Soil  
9 Conservation Service standards and specifications. Order DE-N171  
10 specifically directs the roof be installed. Unlike a water quality  
11 violation, the Settlement does not require causality be shown for the  
12 roof requirement to be triggered for Phase II, i.e. the County and DOE  
13 need not prove Lewis' cattle caused the fecal coliform level.

14 The language of the Settlement is clear and unambiguous. If the  
15 "test results produce readings greater than 100 colonies/100 ml," the  
16 roof is required. (Phase I, Condition 9, p. 5; emphasis added.) The  
17 key word, "readings", is plural. This means that there has to be more  
18 than one reading that exceeds 100 colonies/100 ml. The parties have  
19 agreed to require there be at least two samples exceeding the level  
20 before the expense of a roof is required. In so concluding, we rely  
21 on the plain language of the Settlement. Under the Settlement, there  
22 appears no impediment to the two samples being taken the very same  
23 day. But at the very least there must be two exceedences of 100  
24 colonies/100 ml at the same location as the Background sample.



1 The Board is without authority to alter this requirement. Moreover,  
2 such requirement does not appear unreasonable.

3 Respondents have not proven there were two such readings for  
4 water quality samples taken from the pond during the 1990-1991 calving  
5 season. Therefore, we conclude the Enforcement Order erred in  
6 requiring the roof for the 1991-1992 calving season.

7 VI

8 Pursuant to the Settlement and Enforcement Order, prior to  
9 putting any cattle onto the field for the 1991-1992 calving season,  
10 Lewis has to comply with all requirements of Phase I and II. The  
11 Board is without authority to vary this requirement. However, the  
12 Enforcement Order requires the penalty be paid before the cattle can  
13 be lawfully returned to the field. We find no basis in the Settlement  
14 for that requirement. The penalty is due when this Order becomes  
15 final.

ORDER

Order No. DE 91-171 issued by San Juan County and the Washington State Department of Ecology is AFFIRMED except as to the Phase II roofing requirement, and the requirement of penalty payment prior to entry of cattle onto the field.

DONE this 21<sup>st</sup> day of January, 1992.

POLLUTION CONTROL HEARINGS BOARD

  
JUDITH A. BENDOR, Presiding Member

  
HAROLD S. ZIMMERMAN, Chairman

  
ANNETTE S. MCGEE, Member

Attch.: Settlement

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